

**No. 50141-4-II**  
**THE COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

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KRYSSONDRA R. BURKE,  
APPELLANT,  
AND  
DONILO C. BURKE,  
RESPONDENT.

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**APPELLANT'S OPENING BRIEF**

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## **INTRODUCTION**

In this case, The Superior Court made a finding that Mr. Burke, the father had engaged in a history of acts of Domestic Violence as defined in RCW 26.50.010(3). This was supported by testimony from both the petitioners and respondents witnesses as well as evidence presented at trial.

The Trial Court also heard significant evidence from both the GAL and testimony of Abusive Use of Conflict and Withholding of Children under RCW 26.09.191(3)(e)/(f). However, the Trial Judge did not make this finding. Mr. Burke was strongly reprimanded for this behavior at trial and warned about continuing this type of behavior in the future.

Accordingly, the Court is asked to reverse the Trial Judge's ruling on the parenting plan and place the children with Ms. Burke as the primary parent and also to impose .191 restrictions on Mr. Burke as defined by RCW 26.09.191(1), (2)(a)(iii), (3)(e)/(f).

## **ASSIGNMENTS OF ERROR**

1. The Superior Court erred in naming Mr. Burke the primary parent after the Court made specific findings under RCW 26.09.191(2)(a) that Mr. Burke had engaged in significant acts of domestic violence during the marriage.

2. The Superior Court erred in not making a finding under RCW 26.09.191(3)(e) / (f) Abusive use of Conflict / Withholding of Children even though the Court found this had occurred on numerous occasions as well as the GAL.

3. The Superior Court erred in not reconsidering and modifying the prior rulings of the Court based on CR 59(a)(1), (a)(7) and/or (a)(9).

4. The Superior Court did not give any facts or findings in the denial of the Motion for Reconsideration almost two months after the motion was filed.

### **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

Did the Superior Court abuse its discretion under CR 59(a)(1) by not following the mandatory directive set out under RCW 26.09.191 by *not* implementing limitations on Mr. Burke?

Under CR 59(a)(7), did the Superior Court have a justifiable evidence or reason to make a ruling leaving Mr. Burke as the primary parent?

Did the Superior Court abuse its discretion under CR 59(a)(1) by *not* making a finding of Abusive Use of Conflict / Withholding of Children under RCW 26.09.191(3)(e)/(f)?

Did the Superior Court err in naming Mr. Burke as the primary parent after making a finding that Mr. Burke had engaged in a history of acts of Domestic Violence under RCW 26.09.191(1)/(2)?

### **STATEMENTS OF THE CASE**

#### **Important Facts**

This case is about the Trial Courts decision to enter a parenting plan with Mr. Burke being the primary parent after a finding of domestic violence was made. (CP page(s) 8-21) Furthermore, whether the Trial Court abused its discretion by making that ruling and ultimately a significant injustice resulted in that decision.

This case began back in December of 2013 after Ms. Burke had told Mr. Burke she wanted a divorce due to ongoing domestic violence in the marriage.(RP page(s) 352-355) (CP page 5 – Findings and Conclusions about a Marriage) An agreement was entered between both parties that the mother would be the primary parent. (CP page 4 – Findings and Conclusions about a Marriage). (RP page(s) 62, 240, 274-276, 355-359)(CP Exhibit 50 – Notarized Agreement between Parties)



Multiple witnesses testified at trial and evidence was presented of Mr. Burke's violent and inappropriate behavior throughout the marriage. (RP 190-191, 296-306, 306-317, 337-431 – Exhibit(s) 69 & 71) In Court's ruling, the Trial Judge found Mr. Burke's conduct "absolutely reprehensible" and acknowledged significant domestic violence throughout the marriage. (RP page(s) 451-463) A domestic violence evaluation and treatment was ordered. (RP page 454(17)) The Trial Court Judge, while giving the ruling weighed heavily on the significance this type of behavior and the affects it can have on the children. (RP page(s) 453-454)

In the Findings and Conclusions about a marriage the Trial Judge made the finding under *RCW 26.09.191(1) / (2) – Domestic Violence*

The Court is finding that the evidence supports a finding that MR. BURKE C. BURKE has engaged in a history of acts of domestic violence as defined in RCW 26.50.010(1). (CP page 5 – Findings and Conclusions about a Marriage) The Court expressed concerns about Mr. Burke's use of conflict and the impact it may have on the children under *RCW 26.09.191(3)/(f) – Abusive Use of Conflict / Withholding of Children*. (CP page(s) 5-6 – Findings and Conclusions about a Marriage)

Although the Trial Court made these significant findings and expressed extreme concern in Mr. Burke's behavior, the children were still placed in the primary custody of Mr. Burke. (RP page(s) 451-456)(CP page(s) 8-21)

The Trial Court also made the findings that Ms. Burke was the primary parent during the marriage and that the children have substantial ties to Clark County where she resides and the children were born. (CP page(s) 4-6)

A Motion for Reconsideration was filed on 10/17/2016 requesting the Trial Court Judge to reconsider the decision naming Mr. Burke as the primary parent of the children. (CP page(s) 22-30) This motion was denied without explanation or with any supporting law for a basis of this decision which was received on 12/19/2016. (CP page 31)

### **Standard of Review**

Principally, this case calls on the Court to review and reverse the Trial Court's decision to name the father primary parent after specifically making a finding pursuant to RCW 26.09.191(2)(a) that Mr. Burke had previously engaged in a "history of acts of domestic violence." Review and reverse the decision to provide joint decision making to the parents after specifically making a finding pursuant to RCW 26.09.191(1) that Mr. Burke had previously engaged in "a history of acts of domestic violence. Review and reverse the Courts finding that the father had *not* engaged in abusive use of conflict, and the prior finding that the father had not withheld the children pursuant to RCW 26.09.191(3)(e)/(f).

### **APPLICABLE LAW AND ARGUMENT**

This is a family law case governed by RCW 26.09.002, which provides "In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the Court determines and allocates the parties' parental responsibilities." This case is particularly complex. Both parties had entered into an agreement before filing making the mother primary custodian. After substantial withholding and hostility from Mr. Burke, he refused to follow through with the agreement. (CP Exhibit 50 page ).

The Washington State Legislature has chosen to adopt a statutory framework to direct Trial Courts on how to appropriately structure final parenting plans in the best interests of the children. With regard to Domestic Violence, Washington State Legislature has recognized and acknowledged the significant negative impacts of the exposure to domestic violence that it can have on children. The legislature has explicitly recognized these concerns by codifying the required restrictions when there is a finding of past domestic violence made by the Court when establishing final parenting plans. The legislature has specifically stated, in relevant part, the following about domestic violence findings:

RCW 26.09.191 – Restrictions in temporary or permanent parenting plans.

(1) The permanent parenting plan **shall not require mutual decision-making**...if it is found that a parent has engaged in any of the following conduct:...(c) a history of acts of domestic violence as defined in \*RCW 26.50.101(1)...

(2)(a) **The parent's residential time shall be limited** if it is found that the parent has engaged in any of the following conduct:...(iii) a history of acts of domestic violence as defined in \*RCW 26.50.010(1)...

The Washington State Supreme Court holds that these restrictions within RCW 26.09.191 are **required** when there is a finding of domestic violence made by the Court. *In re the Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998).

The Court in *Caven* was reviewing a Trial Court decision to grant joint decision in a parenting plan after a finding was made that the father had engaged in a history of acts of domestic violence. The Washington State Supreme Court affirmed the Court of Appeals, which had previously made the following ruling: “[w]e hold that the statute requires sole decision-making upon a finding of a history of acts of domestic violence regardless of whether those acts caused grievous bodily harm. Accordingly, we reverse.” *In re the Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998).

Upon reaching the decision to affirm the Court of Appeals, and mandating sole decision making, the Supreme Court stated the following:

In matters affecting the welfare of children, such as parenting plans, the Trial Court has broad discretion, and its decisions are reviewed only for abuse of discretion. But issues of statutory construction are questions of law which this Court reviews de novo. In applying rules of statutory construction to the unambiguous language of a statute, “[t]he Court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute.”



*In re Caven*, 136 Wn.2d at 806. The Court continued, by way of stating that a review of legislative history was unnecessary given that “the language of RCW 26.09.191(1)(c) is clear and unambiguous.” *Id.* at 807-808. The Court also stated that the “words of an unambiguous statute must be given their plain and ordinary meaning unless a contrary intent is evidence by the statute. *Id.* at 810. The Court stated that the Court of Appeals “was correct in concluding that the discretion of the Trial Court in determining parental decision-making is restricted by circumstances stated in the statute.” *Id.* at 808.

The Washington State Court of Appeals has reached this very same conclusion in numerous rulings issued post-*Caven*. In addressing a similar issue, the Court of Appeals has held “RCW 26.09.191 is unequivocal. **Once the Court finds that a parent engaged in physical abuse, it must not require mutual decision-making and it must limit the abusive parent’s residential time with the child.**” *In re Marriage of Mansour*, 126 Wn.App 1, 10, 106 P.3d 768 (2004)

The Court of Appeals chose to reverse the Trial Courts decision to provide “ample unsupervised visitation with both parents” and certain joint decision making provisions stating specifically that “[t]he Trial Court erred by failing to follow the dictates of RCW 26.09.191(1) and (2).” *Id.* at 6, 10.

In the case of *In re the Marriage of C.M.C.*, another similar ruling was also reached in which the Court ruled “[w]e hold that the statute requires sole decision-making upon a finding of a history of acts of domestic violence...” *In re the Marriage of C.M.C.*, 87 Wn.App 84, 86, 940 P.2d 669 (1997). In reviewing the ruling of the Trial Court “de novo,” the appellate Court stated the following in reaching its decision:

We recognize that the Trial Court carefully fashioned a parenting plan that it deemed appropriate for this particular family. The Parenting Act limits the Court’s ability to do so under the circumstances, however. Because the statute requires sole decision-making upon a finding of

domestic violence, the Trial Court abused its discretion in awarding mutual decision-making.

*In re C.M.C.*, 87 Wn.App. at 89. As such, even though the Court of appeals acknowledged the Trial Court may be in a better position to judge the specific facts of a case of a particular case, it also stated that the Court abuses its discretion in ignoring the mandatory provisions of RCW 26.09.191 when they are unambiguous.

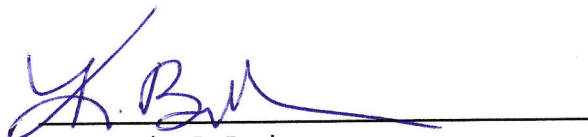
In the this case, the Trial Court erred by way of not following the precise and mandatory directive of RCW 26.09.191(1) and (2). Once the Trial Court made a finding pursuant to RCW 26.09.191 that Mr. Burke had a history of acts of domestic violence the Trial Court was then obligated to follow the unambiguous mandate of the statute. This required the Trial Court to award sole decision making to Ms. Burke, and to “limit the abusive parent’s residential time with the child[ren]” The statute is irrefutably clear that these restrictions are required. Both the Washington State Supreme Court and the Washington Court of Appeals have both maintained that it is an abuse of discretion to disregard these requirements.

### **CONCLUSION**

The Trial Court ordered Mr. Burke to engage in domestic violence treatment, but this falls incredibly short of the legislative mandate codified in RCW 26.09.191 in order to protect children from individuals who have a history of abusive behavior. Given the statute is unequivocal, as clearly stated by the Court of Appeals and Supreme Court, the only solution in this matter is to reverse the prior Trial Courts ruling of the final parenting plan. With the prior finding of domestic that is substantiated by considerable evidence, the parenting plan is required to award Ms. Burke sole decision making, and is mandated to limit Mr. Burke’s time with the children. Given the specific evidence in this case, Mr. Burke cannot be awarded the primary parent of the children. By the Trial

Court allowing such a parenting plan to be entered by which it disregards the clearly defined statutory requirements of RCW 26.09.191 is an abuse of discretion, and contradictory to the law contained herein and undeniably would be a manifest injustice. As such, the appropriate resolution to this matter would be the Trial Courts ruling be reversed and the parenting plan be modified as requested herein given the specific facts and circumstances in this particular case.

Dated this 11<sup>th</sup> day of September, 2017.



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**Transmittal Information**

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